NO. 80-419

Office-Supreme Court, U.S.
FILED
JUN 5 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF ARIZONA,

Petitioner,

VERSUS

MARICOPA COUNTY MEDICAL SOCIETY, MARICOPA FOUNDATION FOR MEDICAL CARE, and PIMA FOUNDATION FOR MEDICAL CARE,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CHALMETTE GENERAL HOSPITAL, INC., THIAN & COMPANY, MONTELEPRE MEMORIAL HOSPITAL AND ST. CHARLES GENERAL HOSPITAL AS *AMICUS CURIAE*

Of Counsel:
John A. Stassi, II
STASSI & RAUSCH
810 Union Street
New Orleans, La. 70112
Telephone: (504) 524-7171
Attorney for St. Charles General Hospital

Philip Montelepre
MONTELEPRE, MONTELEPRE
130 N. Lopez Street
New Orleans, La. 70119
Telephone: (504) 821-1347
Attorney for Montelepre Memorial Hospital

Charles K. Reasonover
Pamela Pryor Mehle
DEUTSCH, KERRIGAN & STILES
4700 One Shell Square
New Orleans, La. 70139
Telephone: (504) 581-5141
Attorneys for Chalmette General Hospital Inc. and Thian & Company

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QUESTION PRESENTED

Whether an agreement among competing physicians setting the maximum prices they will charge insurance companies for services provided to insured patients is illegal per se under Section 1 of the Sherman Act.

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BRIEF FOR CHALMETTE GENERAL HOSPITAL, INC., THIAN & COMPANY, MONTELPRE MEMORIAL HOSPITAL, AND ST. CHARLES GENERAL HOSPITAL AS AMICUS CURIAE 1/

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit is contrary to established law. The fact that the agreements under scrutiny are related to the health care industry does not mandate application of rule of reason analysis to business arrangements which have historically been subject to the *per se* rule. The decision of Ninth Circuit will create tremendous uncertainty in commercial transactions related to the health care industry and will obstruct enforcement of the antitrust laws.

1/ This Brief is submitted on behalf of three small New Orleans hospitals which have brought suit for damages and injunctive relief against Blue Cross [Louisiana Health Service & Indemnity Company] and ten New Orleans hospitals, including the largest hospitals in the area, alleging violations of various provisions of the federal antitrust statutes. Plaintiffs have challenged the validity of the so-called provider agreements, under which defendant Blue Cross fully reimburses the larger hospitals and discriminatorily reimburses the plaintiff hospitals for providing identical medical services to Blue Cross policyholders. Plaintiffs allege that the reimbursement agreements constitute price fixing. The complaints also challenge the conspiracy and monopolistic practices which created the dual systems for reimbursement. *Chalmette General Hospital, Inc., et al. v. Louisiana Health Service & Indmenity Co., et al.*, Civil Action 78-1875 and consolidated cases, United States District Court for the Eastern District of Louisiana.

ARGUMENT

This brief is submitted in support of the petition of the State of Arizona. It is submitted that this Court should reverse the decision of the Ninth Circuit Court of Appeals and hold that an agreement among competing physicians which sets the maximum prices to be charged insurance companies violates *per se* Section 1 of the Sherman Act, 15 U.S.C. §1. The holding of the Ninth Circuit, based on two separate opinions comprising the majority, represents a far-reaching departure from established principles of antitrust law.

The Ninth Circuit acknowledged that price fixing agreements are so lacking in redeeming virtue, that they are usually classified as *per se* unreasonable. "Once so classified a violation of the Sherman Act is made out merely by proving that such an unworthy agreement exists. Actual proof of its competitive impact is unnecessary. It is presumed to be anticompetitive." *Arizona v. Maricopa County Medical Society*, 1980-81 Trade Cases (CCH) ¶63,239 at 78,154.

The court of appeals noted, however, that "this record reveals nothing about the actual competitive effect of the challenged arrangement nor do the authorities, primary or secondary, afford assurance concerning its competitive impact." *Arizona v. Maricopa County Medical Society, supra* at 78,154.

Both of the majority opinions "drew comfort from the Supreme Court's reiteration in *National Society of Professional Engineers*, 435 U.S. at 696, n. 22, of its statement in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), that marketing restraints that regulate professional competition may pass muster under the Rule of Reason even though similar restraints on ordinary business competition would not." *Arizona v. Maricopa County Medical Society, supra* at 78,157. However, in these two cases, this Court in fact held that price fixing by engineers and lawyers is *per se* unlawful. These decisions do

not require the application of the rule of reason analysis to *per se* violations just because professional conduct is involved. The quoted language merely means that certain "market restraints" (other than price fixing) may pass muster under the rule of reason, because of the professional relationships involved. This language merely notes that certain types of professional business restraints may be reasonable under rule of reason analysis; this language should not be interpreted as converting *per se* illegality involving professionals into a question of "reasonableness".

When the issue presented is whether or not agreements fix prices and are therefore illegal *per se*, it is neither relevant nor necessary to determine the competitive impact of the agreements. The initial determination is whether or not the challenged agreements fall within one of the categories of *per se* violations. Only after an agreement is determined not to fall within one of those categories is an examination of its competitive impact necessary or proper.

In *United States v. Socony-Vacuum Oil Company, Inc.*, 310 U.S. 150 (1940), this Court made it clear that power to fix prices may be found to exist even though the combination does not control a substantial part of the market. "Price fixing agreements may have utility to members of the group though the power possessed or asserted falls far short of domination and control." *United States v. Socony-Vacuum Oil Company, Inc.*, at 224.

There is no requirement in the antitrust laws that there be a wrongful increase in fees to establish price fixing and a *per se* violation. First, any agreement which affects prices in any manner is illegal *per se*. *Socony-Vacuum, supra*. Second, in *United States v. Addyston Pipe & Steel Company*, 175 U.S. 211 (1899), and in subsequent Supreme Court decisions, it is well-settled that the reasonableness of the prices set by private agreement is not a defense. See also, *United States v.*

Trenton Potteries Company, 273 U.S. 392 (1927). 2/ Third, in *Kiefer-Stewart Company v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), the Court held that an agreement fixing maximum resale prices among competitors violated the Sherman Act as much as those agreements fixing minimum prices. It is irrelevant whether or not the challenged agreements resulted in an increase in prices.

This Court reaffirmed the *per se* rule last year in *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). If an agreement is determined to be any "form of price fixing, and since price-fixing agreements have been adjudged to lack any 'redeeming virtue', it is conclusively presumed illegal without further examination under the rule of reason." *Catalano, Inc., supra* at 650.

The Ninth Circuit gave "lack of experience" in the health care field as a reason for its reluctance to find a *per se* violation of the antitrust laws, citing *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979).

The Ninth Circuit's reliance on *Broadcast Music* is misplaced because of the uniquely different facts presented. The activities

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2/ "The reasonable price fixed today may, through economic and business changes, become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day-to-day whether it has become unreasonable through the mere variation of economic conditions." *Id.*, 397-398.

alleged to be illegal in *Broadcast Music* involved extensive governmental regulation, "practical problems peculiar to the market for musical compositions" and "a highly unusual fact situation". *National Constructors Association v. National Electrical Contractors Association, Inc.*, 498 F. Supp. 510, 536-537 (D. Md. 1980). "*Broadcast Music* . . . arose in a 'unique context,' characterized by 'the lower court's continuing scrutiny and control of defendants' activities,' 'the approving position of the Department of Justice,' 'the indirect approval of blanket licensing by Congress in the new Copyright Act,' and 'the need for the two organizations and the efficiency of blanket licensing.' " *United States v. Columbia Pictures Industries, Inc.*, 1980-81 Trade Cases (CCH) ¶63, 698 (S.D.N.Y. 1980) at 77,754. *Broadcast Music* was concerned with whether the agreement was in fact price fixing, and not whether price fixing is subject to rule of reason analysis. A court's initial difficulty may be in making a determination that price fixing is involved. However, once the court determines that price fixing has occured, the inquiry is at an end.

It is submitted that price fixing in so basic an industry as health care should be subject to the *per se* rule. It would be most unfortunate if any further exceptions were imposed on the health care industry in view of the imperfections in the nature of competition which already presently exist in that industry. However, if the Court should feel that the health care industry warrants special analysis, a distinction could be made between those agreements which directly involve the professional relationship, and those agreements which involve commercial aspects and which only indirectly involve the professional relationship. If rule of reason analysis is in any way applicable to professional restraints, in lieu of *per se* treatment, it should apply only when truly professional considerations are presented.

Such distinctions are common in antitrust analysis of business agreements. For example, in *Group Life & Health Insurance Company v. Royal Drug Company*, 440 U.S. 205

(1979), this Court distinguished contracts which are the "business of insurance" from contracts involving "insurance business". Furthermore, this Court long ago recognized that it is often necessary to judge a contract by what it accomplishes in fact rather than by the name which is assigned to it. ***Appalachian Coals, Inc. v. United States,*** 228 U.S. 344 (1933). Similarly, different standards may be applicable in considering contracts which regulate professional conduct from contracts which regulate commercial aspects of the professions.

The Ninth Circuit cited imperfections in the competitive nature of the health care industry as a basis for its reluctance to ban price fixing practices on ***per se*** grounds. In effect, the majority opinions would allow private parties to engage in regulation of the health care industry, subject to the rule of reason. Regulation should be the sole province of the legislatures. ***United States v. Topco Associates, Inc.,*** 405 U.S. 596, 611 (1972).

Although the Ninth Circuit's departure from established precedent is a matter of utmost concern, the most serious problems presented by the majority opinions involve the practical application of those opinions. Some of the more serious questions are:

1. If the legality of price fixing is subject to rule of reason analysis in health care antitrust cases, does rule of reason analysis also apply to all other types of antitrust violations which have traditionally been illegal ***per se*** in every other industry.

2. Will the "reasonableness" of price fixing in the health care industry vary from region-to-region, and from jury-to-jury, depending on the current philosophy of each jury.

3. Will summary judgment be inappropriate in all

health care cases, regardless of the severity of the violation, because a question of fact is always presented with respect to the reasonableness of the conduct.

4. Will criminal prosecution for price fixing in the health care industry be possible, in view of the difficulty in establishing illegal intent, beyond a reasonable doubt, when the rule of reason is the test for determining illegality.

Another serious practical problem which results from the Ninth Circuit's majority opinions involves the time and expense devoted to correcting what has traditionally been the easiest type of antitrust violation to remedy. If summary judgment is not in fact precluded in the health care industry by the Court of Appeals' opinions, summary judgment in traditional *per se* type cases would no doubt be extremely difficult. In almost every situation a full trial will be required. Private enforcement will no doubt be discouraged. The larger health-care-related organizations will be inclined to "roll the dice" on the outcome of any particular jury's appreciation of the "reasonableness" of the conduct involved. Often the stakes will be enormous in both social and economic impact. Consequently, the attention of the judicial system will be burdened even further with the explosion of health-care related litigation already reaching significant proportions.

As this Court stated in *Northern Pacific Railway v. United States*, 356 U.S. 1, 5 (1958):

> "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of

per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit or everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable - - an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing . . . ; division of markets . . . ; group boycotts . . . ; and tying arrangements . . . . " (citations omitted.)

CONCLUSION

The decision of the Ninth Circuit is contrary to established antitrust law. There is no basis for the application of rule of reason analysis in *per se* situations to all professional relationships in the health care industry, and the decision could pose an insurmontable obstacle to private and public enforcement in the health care industry.

It is respectfully submitted that this Court should reverse the Ninth Circuit, and hold that:

1. The *per se* test for determining the illegality of price fixing under the antitrust laws also applies to the health care industry; or

2. Alternatively, should the Court conclude that the health care industry warrants special analysis in determining the legality of price fixing, such a rule should only apply to matters directly related to the professional relationship, and the established tests for determining legality would apply to the commercial aspects of the health care industry.

OF COUNSEL:

John A. Stassi, II
of
STASSI & RAUSCH
810 Union Street
New Orleans, Louisiana 70112
Telephone (504) 524-7171
New Orleans Attorney for
St. Charles General
Hospital

Philip Montelepre
of
MONTELEPRE, MONTELEPRE
130 N. Lopez Street
New Orleans, Louisiana 70119
Telephone: (504) 821-1347
New Orleans Attorney for
Montelepre Memorial Hospital

Charles K. Reasonover

Charles K. Reasonover
and
Pamela Pryor Mehle
DEUTSCH, KERRIGAN &
STILES
4700 One Shell Square
New Orleans, La. 70139
Telephone: (504) 581 - 5141
New Orleans Attorneys for
Chalmette General
Hospital, Inc. and Thian
& Company

CERTIFICATE OF SERVICE

This is to certify that on the 4th day of June, 1981, the original and thirty-nine copies of the Brief for Chalmette General Hospital, Inc., Thian & Company, Montelepre Memorial Hospital, and St. Charles General Hospital as Amicus Curiae were forwarded by air courier from New Orleans, Louisiana, addressed to:

Office of the Clerk
Supreme Court of the
United States of America
Washington, D. C. 20543

At the same time three copies of the Amicus Brief were mailed, first class postage prepaid, at New Orleans, Louisiana, addressed to counsel as follows:

Kenneth R. Reed
Special Assistant Attorney General
114 West Adams, Suite 760
Phoenix, Arizona 85003

Philip P. Berelson
Brown & Bain
222 North Central Avenue
Phoenix, Arizona 85004

Robert O. Lesher
Lesher, Kimble & Rucker
3773 East Broadway
Tucson, Arizona 85716

Daniel J. McAuliffe
Shell & Wilmer
3100 Valley Bank Center
Phoenix, Arizona 85073

Solicitor General
Department of Justice
Washington, D. C. 20530

CHARLES K. REASONOVER